

Law, Government and Third Sector in Brazil: Improving deficient regulation to promote better accountability

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Introduction

This paper aims to contribute to the analysis of the shortfalls and challenges in the Brazilian federal normative system that regulate the access of third sector organizations (TSOs) to public funding and its service delivery role. Its initial background is a set of legal reforms conducted by the federal government that took place in the 1990s when, at the same time, denouncements of public money misappropriation involving these organizations became more frequent.

The Brazilian third sector has grown in size and visibility since the country reinstated its democracy in the mid 80s. Governmental research data (Brazil, 2004) shows that in 2002 at least 276,000 private foundations and associations were legally registered in the country, working in several fields.

Brazilian TSOs have also been occupying important political spaces, like public policy monitoring in local councils, citizen-based control over governments and public service delivery in social areas, where governmental performance is not enough. Because of that, they count on several institutionalized channels to access public funding.

The awareness and compliance with all legislation are not easy, neither for the organizations - which usually do not have experienced staff - nor for the government, whose programs involving partnerships with third sector demand a wide monitoring capacity.

Laws that regulate these organizations are diffuse and complex. Complexity and lack of clearness in the legislation has also been used as a tool to promote corruption schemes, public funding deviation and tax evasion. The abuse on the use of the “non-profit” and the various scandals brought out by the media show the effects of this scenario and undermine the credibility and the legitimacy which the good organizations sought to obtain. It also undermines the strengthening of trustworthy practices, capable of showing the achieved results and the correct use of public money adequately.

At the same time, data from the Brazilian Federal Court of Accounts (TCU) showed growing transference of public funds to TSO projects and programs, about R\$ 2 billion per year and from 2001 to 2006, a total of R\$ 12,5 billion. In 2003, 3,247 TSOs received

sources from federal government; in 2005, this number had already increased to 4,508 (Ferreira Neto, 2007). TCU also pointed that there were several problems as to how all this sum of public money was spent and which results were actually achieved.

Therefore, confusing regulation and difficulty in the government's monitoring and supervision contribute to a lower accountability of TSOs in Brazil.

This article aims to describe such difficulties in the governmental monitoring system and discuss some proposals outlined with the purpose of diminishing the lack of control index and transparency of the access of these organizations to public funding. We also focus on outlining which questions are still in need for an answer, which thus shall be considered.

Methodology:

This current article combines characteristics of an explanatory study with a descriptive one. On the one hand, such study can be considered explanatory due to the fact that it will focus on identifying which inquiries seem pertinent when analyzing these theme - TSO access to public funds, this latter to be considered a topic that still needs to be explored by the Brazilian literature; the Brazilian literature has been focusing more on TSO role on formulating and implementing several public policies, (which could be called a "programmatic" focus), rather than a more "instrumental" focus of the control and use of public funding; on the other hand, this study can be considered descriptive in that it aims to present a thorough description of a phenomenon inside its context (Yin, 2005)

Governmental data will be analyzed in the federal area showing the amount of funding for the third sector, important reports from federal audit court and of legislative branch commissions, which investigated activities developed by TSOs under governmental programs. News and media debates about political scandals involving public money misappropriation through TSOs and data from other empirical studies and case studies will also be used.

Third Sector in Brazil: a brief historical overview:

In Brazil, up to the 1980s, the main characteristic of the social policies excluded civil society from the formulation and implementation, of governmental action, making up a non-democratic standard the relationship between Society-State. The State should be held fully responsible for the delivery of the major part of available public services – this was so due to not only the lack of responses given by the market, but also the fragility of the civil society (Farah, 2001) -, being it the model that was questioned, according to Bresser Pereira e Grau (1999).

There has been a chain of philanthropic organizations playing an important role in the fields of social assistance and health, such as "Santas Casas", child-care institutions, orphanages, old people's houses and houses for the disabled (Ciconello, 2004), those of which had benefitted from fiscal incentives and resources provided by the State. The first bills of law that started outlining such incentive system date back from the 30s; such system, thus, would be developed after this date. Nevertheless, the military dictatorship generated some

fierce centralization of power that reflected on the presence of state standard process regarding service delivery as well as lack of agreement between the State and the society throughout a period of severe restrictions regarding the right of association and assembly (Gohn, 2001).

The political opening that took place in the 1980s brought noticeable stimulus for the establishments of TSO/NGOs in many fields. In the past two decades, however, there has been a huge increase in the number of civil associations which, besides taking important actions on public service delivery where state action was not enough, have shown an opposite opinion toward the authoritative government that mobilized civil society (Landim, 1993; Parker, 2003) The civil society associations also tried to take part in some political positions so as to influence and closely monitor public policies and also in order to get access to public funds that could possibly provide support for their activities.

Besides assuring freedom of association and assembly, the 1988 Constitution has also highlighted the probable complementary role of TSOs in many public policies, such as health, education, assistance, sports, childhood, youth, not only by delivering public services, but also by cooperating to implement and monitor such policies.

When President Fernando Henrique Cardoso's term started (1995), a process of reforms of the State and Public Administration took place, having its bases outlined in the plan called *The White Paper for the Reforms of the State Apparatus (Plano Diretor da Reforma do Aparelho do Estado)*.

One of the items regarded the "public non-statal" concept, which was viewed as a strategy adopted in order to decentralize scientific and social services which didn't involve state power, keeping as the State's responsibility the provision of funds and regulations. Its picture would entail an organization which could be considered neither state nor private, being non-profit, QUANGO inspired, thus called Social Organization (SO), which role was to "provide services of public interest, having public financial help and private-sector-like ways of working, being, thus, submitted to double-sided control: state and citizen-based ones." (Morales, 1999, p.62).

Also under this context, The "Comunidade Solidária" (Solidary Community) Board, a program linked with the Brazilian Presidency, started a process of political talks with TSOs and government's representatives in order to restructure Brazilian Third Sector Legal System, which proved the incompatibility of the Brazilian legal system to carry out the new roles that were taken up by such organizations, as well as faced new regulations, publicity and the watchdog role demanded by the society, in addition to the necessity of for more flexibility on behalf of the State. (Ferrarezi, 2001).

One of the most noticeable results of this process was a new federal law that passed, #9.790/99, which qualifies part of TSOs as *Civil Society Organization on Public Interest (Organizações da Sociedade Civil de Interesse Público - OSCIP)* and coined the "Partnership Term" (*Termo de Parceria*), suggesting that there be some improvement on

the partnerships, focusing on modernizing ways of establishing partnerships with the government, following more adequate efficacy and efficiency criteria of responsibility (*Ibid.*, p.16).

The main lobbying point related to the reforms agenda in the 1990s in Brazil was the focus on management for results, efficiency, citizen assistance, public-server user participation, transparency and accountability.¹

When analyzing this brief outline, an important issue regarding the institutional rules for the access to public funds arises. It is true that Brazil, in many categories, established numerous cooperative bounds with TSOs in many public policies.

While carrying out a research on available resources for the funding of NGOs in several federal public organs, the Brazilian Association of Non-Governmental Organizations (ABONG) started 325 programs into the Federal Pluriannual Budgetary Plan (PPA) 2000-2003 and 360 ones into the PPA 2004-2007, which counted for some sort of partnership (ABONG, 2004)

In general, it is tried to make use of traditional ways of money transfer to the private sector (contracts), or among state organs and agencies (grant) without taking the TSO's specific characteristics and the source of all the implemented activities into account. (Ferrarezzi, 2001; Szazi, 2002).

Carvalho Neto (2007) explains the problem: while the number of partnerships gets higher, controlling organs and Investigative Committees (CPIs) from the Legislative Organ have found out some mixture of public and private interests as well as a number of money deviations; there seems to be a "race" encouraged by some people who see opportunities of taking advantages of some facilities and shortfalls of the transfer model of non-exclusive services from the State to TSOs.

According to a federal prosecutor linked with TCU, the money transfer from the government to TSOs seems to be out of control – "People who wish not to diverge money will not do so, under their willingness" (Folha de São Paulo, <http://www1.folha.uol.com.br/folha/brasil/ult96u339720.shtml>).

Topics to be talked over, such as choice criterion of TSOs by the government, outlining of activities to be done and goals to be reached, forms of interaction with governmental programs, outlining of unallowable expenses, ways of payment regarding provided services, length of agreements and ways of monitoring do cause disagreements and raise doubts among public managers, heads of TSOs, researchers and legislators.

Taking into account that many countries develop institutional and efficient ways of transferring resources, this shall be considered a very important issue when it comes to

¹ Advancing in relation to the first course of state reforms in the 80s which had as main focus the cutbacks on public expenses, privatizations and balancing public accounts.

shared public policies with the third sector. Likewise, the design of the rules that guide such access can be determinant regarding the effectiveness of such policies, as well as its transparency level and controlled use of the resources.

Literature review

The partnership relationships that the third sector will develop with the State/Government can be analyzed in many ways. What calls attention the most, however, is the interaction that comes as of the moment the State/Government seeks in TSOs some kind of structure capable of delivering some public services, which somewhat, it does not work on, deciding, then, to establish partnerships thus transferring public sources.

First of all, literature shows the importance of analyzing the impacts of the legal framework in influencing third sector actions, which evolution can be directly affected by its “favorability” or “unfavorability” (Salamon and Toefler, 2002). For instance, requirements to establish legal personality, enjoy tax exemptions and public funding and in what extent, can determine the paths by which third sector will develop and what relations will be built with the State, the Market and the citizens.

It is important to think of efficient institutional ways that make sure there will be regular public funding to TSOs, as of the moment when they are appointed as public policies executors.

Such relationships can mean, on the one hand, the establishment of cooperative and responsibility division principles, where they have distinctive action fields in one specific public policy. On the other hand, they might be judged as attempts to build models of minimal state – where it can exempt itself from doing certain traditional activities provided by *Welfare State* – wordily defined as “privatization”, “outsourcing”, “disassembling”, and “neo-liberalism”, to name a few. In both cases, the institutional ways can, yet, allow for or try to diminish corruption schemes and money deviation, which must be an important issue to be considered. (Campos, 2005)

Taking a second look, Kramer et al (1993) mentions various studies in many fields of social science that started analyzing ways and reasons why the State would generate partnerships with such organizations for the public service delivery, as well as understand its role – under changes – inside the modern democracies and specifically in social welfare states.

Other studies show how some countries have established institutionalized task division over the years; in the Netherlands, for example, third-sector organizations take hold of a great share of public service delivery, in a way that can be considered almost monopolistic (Aquina, 1992); also, in Germany, where strict laws have been created so as to define responsibilities, and avoid undertaking of actions. (Anheier, 1992)

From another angle, though under the same theme, Taylor (1992) has described England’s experience in TSO public service delivery and highlighted the effects of different ways of contracting and governmental support over the independence and maintenance of the missions of these organizations. To the author, however, the State should not only pay for

the services, but also hold financial responsibilities as to maintain the work of the sectors it depends, enabling resources for the infrastructure, to name a few.

Specifically in Brazil, other studies will focus on analyzing partnership relations between the State and the third sector according to the referential items brought by the State Reforms under Fernando Henrique Cardoso's government - specially the concept of "public non-statal"; on the one hand, some authors understood that it could be a viable option able to improve the quality of the public service delivery (Bresser Pereira & Grau 1999; Morales, 1999). On the other hand, some would view the State withdrawing from some sectors of public relevance as well as from the narrowed administrative law system (Di Pietro, 2002).

Many studies have been carried out so as to understand the implementation of new organizational formats, brought out from the SO/OSCIP nominations/titles, as well as which changes and improvements were reached both in the State and in TSOs. (Ferreira Jr; Trezza 2006)

Focusing on understanding this dynamics, Carvalho Neto's work (2007), for instance, aimed at identifying the main issues that determine or contribute to possible irregularities and money deviation from the Federal Government to TSOs, establishing 3 categories of analyses in order to evaluate the efficacy of the procedures:

1. How adequate the available structure of the organs/agencies that provide funding is;
2. Clarity and objectivity of the criteria of choice of the TSOs;
3. Tools and mechanisms that guarantee accountability.

The author concludes that all the governmental structure for the monitoring and the tools and mechanisms of transparency are insufficient to guarantee an effective implementation of the contracted actions as well as a regular and adequate use of the funds transferred to TSOs.

Although this work is related to the legal and budgetary areas, it highlights the importance of some analytical categories used in the fields of public administration and political science, such as "conflicts of interests", "assimetry of information" and transaction costs, from a principal/agent perspective (Przeworski, 1998).

The principal/agent perspective has been used by Przeworski (1998) in order to think about the accountability, from the difference of information that each of these (principals and agents) have.

In this case, the author talks about the requisites by which citizens (principal) can impose accountability/responsiveness mechanisms toward State (agent). Other analyses are also possible to be made by positioning different social actors on these same positions. As per this article, the State would occupy the principal position while TSOs would be considered agents.

The literature about accountability also develops many possibilities of control over public administration, its advantages, limitations and combinations, ranging from the classical controls via procedures, undergoing parliamentary control, result-oriented, administrative competition and citizen-based controls.

For the thinking over this work, we are basically interested in the control of procedures traditionally used and new ways of result-oriented control that introduce in the public administration the “managerial bias”, which, in accordance with Quirós (2006:26) consists in:

Final evaluation of the program execution as a means to measure its performance and thus, require that reports from public managers and bureaucrats in charge, regarding its execution and the obtained results.

With State reform experiences in the last 30 years, such control has been implemented by the so-called “goal contracts”, formalized among ministries and governmental agencies and also, among these and TSOs that deliver public services as a way of coming into terms and make the results to be obtained transparent.

According to Abrucio (2006:79):

The performance of governmental organs should be based on contracts, with which the core nucleus of the State establishes parameters to either the decentralized units or non-state public service providers, who gain managerial autonomy but, at the same time become more accountable to the demands of the citizens.

In the studies where some briefly-cited cases were given as examples, some important facts were noticed; these facts show some reforms and transformations of the State as to the questioning about an exclusive state standard in the production of assets and public services that show shortfalls, which are no longer adequate to the social demands currently, added to the democratization process of many countries and, specially, the redemocratization of the Brazilian society.

From this point on, partnership cases between the State and third sector regarding service delivery, its results, institutional shortfalls and challenges to be faced for its recovery, besides that the roles and behaviors conducted by the social performers have been analyzed.

Yet, considering the possible models of distribution of roles and responsibilities between the government and the third sector created by Gidron et al. (1992), the fact that discretionarity and bargain capacity of the organizations influencing the model, has already been raised and made aware.

TSOs can be simple executing governmental agents (cooperative provider model) or have better influence and spectrum of action, managing and developing programs as well as participating in political processes (cooperative partnership model)

It can be thought that the cooperative provider model is the most common one, due to the

fact that the State owns the financial sources at hand, and the right to establish contracts from its own guidelines. Nevertheless, for the authors, the settings of the third sector in many countries, as well as the difficulties faced by biggest governmental agencies to monitor their grantees, it is suggested that the cooperative partnership model be the most commonly used one.

The main question lies in learning how the state agents and TSOs shall behave in relation to the context of difficulties in the monitoring.

Law and Third Sector Sector in Brazil:

This chapter has as its main objective the showing of a general picture of the Brazilian legislation to which TSOs, as well as governments, are submitted to when partnerships and access to public funds are concerned.

As said before, there is a broad set of norms that regulate the third sector actions in Brazil, going from the first republican 1916 Civil Code (only recently revoked), which carries the requirements to register not only private foundations and associations, but also the first “Public Utility Titles” in the 1930’s, until the fiscal laws with tax exemptions and others, that regulate public funding in areas such as social welfare, health, culture and education.

Searching for a didactic division way, we would have the following norm categories:

1. ‘Programatic’ norms that establish the ‘position’ the third sector will occupy in a determined public policy, starting by the Federal Constitution and going through several sector norms, such as health, social welfare, environment, among others.
2. Estimative norms, that establish rules on the transfer of resources, based on the elaboration and execution of public estimates/budgets in the three government areas (federal, state and municipal).
3. Procurement norms: Establish distinctions between traditional administrative contracts and grants and also establish rules on the buying of assets and services, which could or not be subject of mandatory observation also by the third sector organizations.
4. Norms that establish titles that could be requested by the third sector organizations and that provide fiscal benefits or priorities/preferences on the achievement of government partnerships. These ones enclose the traditional public utility bonds, as well as norms that establish registration and application in social assistant policies, environment, child and adolescent and moreover new titles (SO and OSCIP) that were created in the 90’s.
5. Infra-legal norms of more operational characteristics: the main case is the one of IN 01/97 STN (National Secretary of Treasury), that establishes rules to be complied with in the formalization and operation of the federal area grants – obligatory clauses, planning and execution of the working plan and ways of administrating the resources transferred during the process. The contract modalities

of OS an OSCIP titles, which are the managerial contract and the partnership term, respectively also carry determinations and rules for its operation.

The structure of the Brazilian State establishes several forms of control, often competing among NGO themselves. Besides the control to be performed by the institution or ministry themselves, the TSOs might have to report to institutions like the Courts of Accounts, the Federal Audit Agency, besides the Legislative Court , Public Ministry and the Ministry of Justice.

Common scandals? The abuse of the ‘non profit’:

In this chapter, we will make a briefing from newspaper editions as well as the institutional positioning of the governmental, academic, Legislative and Public Ministry people.

Some articles published in expressive circulation newspapers in the country show some of the main shortfalls involving the celebration of partnerships and transfers of resources to the TSOs. The discussion about the criteria on how to contract institutions of the third sector appeared in the formulation of the Budgetary Guidelines Law dated 2007, when the president denied a part of the law bill which demanded for the mandatory launching of biddings by the governmental organs to select institutions. The veto was justified by the president as being a protection against the risk of having important governmental actions interrupted, being then not adequate to adopting a uniform solution. Yet the government knew about the need to increase close control on the transfer of funding to the NGOs (Folha de São Paulo, 06/01/2007, under the headline “Após veto, governo quer novo critério para as ONGs”).

Nonetheless, another important matter was included in the law bill and maintained by the president, who forbade funding transfers to TSOs that either were linked to congressmen, or had relatives occupying management positions, thus aiming at lowering risks of conflicts of interest.

In another publication, an ex-São Paulo mayor has been first-degree sentenced for allowing the hiring of an NGO to carry on works with public school teachers. The issues hereby discussed regarded the possibility of a competition in contrast with the aim of the partnership (teacher formation and coordination of activities on sexual orientation), once the NGO had broad experience on the matter, and whether there would be a conflict of interests or not, in that the mayor, being one of the founders in the 80s, carried out a lot of works up to 1994, and had a symbolic honor presidential position (Folha de São Paulo, 22/06/2005, under the headline “Juíza torna Marta inelegível por 3 anos”).

A more severe case concerning conflicts of interest has been spotted in Rio de Janeiro, where a governmental foundation firmed contracts with 12 NGOs. Besides the majority of the contracts being made with no binding, the Public Ministry argues about the fact that their tools had been generic and difficult to understand (in some of them there were no basic plan), there has been no attention paid towards the compatibility of project costs when compared to prices practiced on the market, leading contractions to be made under

overpricing conditions; in the end, 3 NGOs had as partners people who were partners of companies that made donations to the ex-governor (whose wife was then the governor). Besides not explaining how they could provide the hired services, NGOs can still not explain how they provide services to the state in that they use a common list of addresses that have never been used or have been extinguished.

In the National Congress, the theme "NGOs" has been an issue of two specific Investigative Committees (CPI) and has also been connected with another Committee that investigates public resources deviations on the purchase of ambulances by municipalities. Among the presented conclusions, rudimentary regulations have been appointed, which is a phenomenon of proliferation of NGOs and the absence of controlling ways that, since 2001 Brazil has grown a short bit in terms of solutions to face the problems (Carvalho Neto, 2007)

As from this context, the author has summarized some of the perceptions of government active people and the press on this partnership dynamics: perceptions over an NGO proliferation without controlling ways, specially over public resources; unjustified outsourcing as from the execution of public policies to the lack of choice criterion of NGOs and transparency on the account deliver; deceiving of the demands of public contests (outsourcing and indirect nepotism) and of bindings; political and electoral use of resources, and unlawful enrichment.

What does the federal government monitoring show?

In this chapter, we shall use data of Decision 2066/2006 of TCU (2006), which consolidated data of various audits and verified the regularity of the application of federal funds transferred by the Federal Government to TSOs. This will be the main source of data of the work.

10 NGO's and 28 grants were audited, which were selected according to the following criteria: amount of funds transferred, entities already investigated by the Investigative Committees of the NGO in the National Congress and mention of the NGOs in newspaper and magazine articles. The grant amounted to R\$ 150,698,123.93 and various objects: indigenous health, concession of scholarships for the formation of masters and doctors, support to minors in social risk situations, construction of hospitals, acquisition of equipment, maintenance of basic health unit, conservation of natural resources and qualification of members of municipal councils, as well as youngsters in the First Job Program.

The main conclusions of the TCU reveal a rather complicated situation in the establishment and management of the partnerships between the Federal Government and TSOs. Let us see some of them:

The **first** group of irregularities concerned serious shortfalls in the formulation and evaluation, both technical and legal, of the grant instruments, still in the phase before they were signed:

- Badly elaborated work plans, with imprecise objects, which would not permit the exact identification of what is intended to be done or obtained, and insufficiently described goals, lacking qualitative and quantitative information and often difficult to understand.
- Lack of a basic project, incomplete or with insufficient information, causing the depreciation of the object and the occurrence of irregularities in later phases.
- Insufficiency and even lack of the information required by the conventional implementation standards.
- Lack of clearness in the development of the goals and actions that shall effectively be implemented, not permitting to know which products or services must be provided to the community and generating unreal disbursement schedules, without correlation between the phases of physical execution and the required allotments. It increases the excessive or insufficient release of funds in detriment to the administrative rationality and of the services to be provided to the population.
- Shortfalls in the technical evaluation and legal appreciation of the work plans and terms of grants on the part of the governmental organs/agencies. Inexistence of detailed analyses of costs of the proposed objects and capacity of the entities supposed to execute them.
- Approval of grants in the absence or lack of opinions. Inexistence of technical analyses about the feasibility, opportunity and convenience of the execution.
- Execution of grants in which the action of the entity is merely for interposition of the recourse between governmental entities and research institutions.
- No detailed analyses are made or documented of the costs involved, without elements to demonstrate the compatibility with the prices practiced on the market of the respective region. The absence of restrictions to the shortfalls of the work plans associated to the inconsistencies between the opinions and the elements contained in the process suggest only a *pro forma* analysis standard.

The second group of irregularities concerned the method to select the entities, both in relation to the evaluation of their technical capacity and to the use of non-objective selection criteria:

- Decentralization of execution to entities that do not have the necessary conditions for the accomplishment of the objects or statutory attributions to execute them. In all cases, there was no evaluation of the technical and operational qualification of the grantee for the accomplishment of the proposed objects. This qualification was almost always considered legal, regardless of the object agreed.

- Absence of transparent criteria to select the NGO's that will receive funds by means of grants and similar instruments. There is no bid notice publication for qualification and selection of the entities that will provide services to the community, or use of the legal titles attributed by the Public Power as evaluation criterion in the selection of the entities.

The case of an NGO in the indigenous health area was indicated as typical to demonstrate the irregularities pointed out in this second block: the first grant was executed only three months after TSO had been established, revealing, at least, negligence and absolute disregard as to the rules that condition the execution of the grants, due to the magnitude of the funds involved and continued nature of the activity. The audit evidenced that the NGO did not have any other source of resources rather than the grant ones and that it admitted that it had been created specifically to execute grants with Funasa (the governmental agency responsible for the indigenous health policies). After the moment in which the governmental organ decided not to execute a new grant, its administrative structure, mounted specifically to support the execution of grants, was deactivated.

In another similar case, the NGO was configured as a cultural organization and not as a provider of health services, but FUNASA awarded grants for the delivery of medical assistance to Indians. The case is typical because it demonstrates a cause-and-effect correlation between the execution of grants with entities that do not have the necessary conditions to accomplish them, both in terms of attributions and administrative and operational capacity, with the irregularities committed in the phase of accomplishment and the consequent damages to the public treasury.

The third group of irregularities deals with problems related to the phase of inspection and supervision of the accomplishment of the grants and reveal inspection of the accomplishment of the object unsatisfactory or not carried out and absence of instruments for evaluation of the results of the grants.

- There are no procedures for evaluation of the results achieved in terms of benefits, economic or social impacts or, also, as to the satisfaction of the target-public in relation to the object implemented.
- The technical evaluations of the execution and achievement of the objectives of the grants are superficial, based on reports presented by the entities, without evidence of deeper investigations of the consistence of the information received. They are based only on the usual information of the accounts settlements, without support in inspection reports and/or local supervision of the accomplishment of the object.
- The phase of supervision and inspection of the accomplishment is being neglected by the governmental entities, reducing even more the little expectation of control on the part of the entities and impairing the adoption of timely measures to correct the series of harmful resulting consequences, such as the risk of non-achievement of the object by lack of accomplishment, partial or imperfect accomplishment, improper management and waste of the funds transferred.

A fourth issue indicated by the TCU, after the grants executed by FUNASA for the accomplishment of actions concerning the indigenous health, points out that this activity does not have a definite duration and, therefore, the execution of grants for its accomplishment would not be applicable. What is verified in the case of these grants would be a true outsourcing of activities that should be under the responsibility of that agency.

A fifth group of irregularities was indicated in relation to the bidding and hiring procedures carried out by the entities. Initially, there is the issue that is still controversial at the federal level, if the private entities that receive public funds transferred upon grants must participate in bids and be subject to the rules of Act no. 8.666/93 (and to what extent).

- It was verified that the bidding and hiring (or analog) procedures adopted in some cases are carried out in a precarious and rudimentary fashion, and do not comply with any of the legal requirements mentioned in the previous sub-items. There are manifest cases of procedures carried out for mere formality and others with signs of fraud in the acquisition and hiring processes. In others, there is nothing in the account settling processes to evidence the accomplishment of any bidding or similar procedures.

It is observed in actions carried out by the TSOs, such as, for example:

- Countless direct engagements of specialized assistance and consulting services.
- Outsourcing, without bidding processes, of the accomplishment of the objects agreed in the grant to various consulting companies
- Acquisition of goods and services upon the accomplishment of a mere price quotation procedure, or not even that, without any publication in the official press and without verification of the qualification of the suppliers.
- Simulated quotation procedures, along with new, small or ghost companies, indicating possible partiality, and quotes very near/aligned with prices always a little above the winning quote, forging competition.
- Supply of products by companies that do not act in the field of the quoted object, companies created a little before the effectiveness of the grant and ghost companies, with inexistent address.
- The practice of acquiring products and services for prices above the market prices was also effectively verified in some grants.
- Execution of contracts without necessary clauses, undetermined effectiveness, prevision of readjustments in periods shorter than one year and pre-determined readjustment values without any relation to price indexes, among others. There were also illegal additions in the objects hired, by means of amendments, exceeding, by far, the limit permitted in the legislation.

The last group of irregularities indicated in the Report concerned the lack of compliance with the rules of financial execution of the funds transferred:

- Irregular operation of the specific accounts.
- Signs of fraud in the payments and documents evidencing expenses.
- Use of the funds for different purposes, in non-permitted expenses and on dates after the effective date of the grant.
- Withdrawal of values as supply of funds for acquisition of goods and payment of services, which is not permitted by the federal rules.
- Checks cashed directly at the bank branches for supposed payments, in kind, to various beneficiaries and often of large amounts.
- Absence of evidences of the accomplishment of many of these payments, for example, bank deposit receipts that permit to identify the destination and the creditor.
- Occurrence of fraudulent procedures characterized by the issuance of invoices with dates preceding the dates of authorization to print the respective fiscal documents, as well as the chronological disorder of the fiscal documents issued by the same contractor/supplier. Accomplishment of payments before the delivery of goods or delivery of the services, or at higher values than those contacted.
- Absence of certificates evidencing the execution of services/works or supply of goods in the documentation that supports the expenses; lack of register of the number of the grant in the documents evidencing the expenses incurred, which permits the use of the document in more than one account settlement; expenses incurred for a different purpose than that of the object agreed; payment of expenses of one grant with funds of another; payment of expenses under the responsibility of the granting entity with funds of the grants; payment of funding expenses of the entity, e.g., payments of telephone bills and salaries of employees; acquisition of items that integrate the fixed assets of the entities; and undue payments of interests and penalties.
- Absence of control or protection of the materials and equipment.

Finally, as possible improvement proposals, the TCU recommends that the rules and systems that govern the execution of grants at the federal level be altered so that:

- The grantor organs will establish objectively verifiable and transparent criteria for the selection of the private entities that will receive resources;
- The direct selection of a certain organization will always be formally justified by the governmental manager in charge, with the indication of the determining motives and demonstration of the public interest involved in the partnership;

- The concession, maintenance and cancellation of legal titles by the government will be object of wide publicity on the part of the organs that grant them, in order to enable the necessary transparency to the corporate control, since benefits such as tax exemptions are associated to such titles;
- The Federal Government will elaborate a technical study in order to endow its organs with the minimum structure necessary for the good action in the control of the transfers of public funds;
- An on-line system will be implemented to permit any citizen to supervise all grants, and to contain all necessary relevant information, such as data about the entity, as well as the congressman and the budgetary amendment that allocated the funds, if any, the detailed work plan, costs predicted in each phase, the bidding procedures accomplished, the status of the physical accomplishment schedule with the indication of the goods acquired, as well as services or works executed, and the expenses incurred discriminated by supplier, among others;²
- The organizations will also report, at their websites and at visible places in their headquarters and establishments where they perform their actions, all of the grants executed, indicating the values received and the purposes to which they are destined, with the details of the objectives and goals to be achieved;
- The granting organs will declare in their technical opinions the aspects of the physical accomplishment and achievement of the objectives of the grants, the procedures and criteria adopted in the respective evaluations.
- The denouncements received about supposed irregularities will be object of high priority treatment at the granting organs/entities;
- The standardization of the accounting records on the part of the entities of the third sector will be obligatory, based on the provisions of the Brazilian Accounting Standards, and the professional responsible for every entity shall respond, jointly, for the malicious acts, chiefly in relation to the competence of the fiscal documentation, faithfulness of the accounting records and account settlement concerning the funds transferred;

Analysis of the points shown in the report

This chapter shows some of the conclusion that the Court of Accounts (TCU) outlines in its document. According to the control organ, the analysis of the grants will make way for the establishment of a direct cause-and-effect relationship among the working plan techniques, costs allocation and adjustments, and conditions of the entity as to the execution and effectiveness of subsequent phases (follow-up of the execution and result evaluation, as well as account renders), following the signature of the grants. In case this first phase is

² The current system is simpler than the predicted one and brings little information, which individually does not permit a thorough evaluation of the execution of a certain convention.

neglected, it is certain that irregularities shall happen in the following phases. As per TCU's view, the first controlling phase would be the most effective and the least costly one.

The outlined irregularities coming from superficial technical and judiciary analyses ended up placing the public administration in many dangerous and risky situations, among which we can name: celebration of grants that do not meet public needs or the targets of the governmental actions; pacts made by means of improper instruments and/or having implicit legal risks; loss or damage of the money due to the misuse or deviation of public resources as a result of unviable or over-scaled costs, dishonesty, lack of conditions or incapability of the granted TSOs.

It is noticeable that, failures apparently formal and identified in the analyses phase of the propositions and pacts of grants, whether they are not aimed at facilitating the process, they end up making way for a huge amount of irregularities in the execution phase and in the forming of the respective court of accounts.

Facing the systematic occurrence of failures, there seems to be a severe lack of administrative capacity to realize required duties to the ones who manage the application of public resources, such as biddings, contractions, pay-offs, and courts of accounts, cumulated with a poor evaluation of the historical and ethical referential of the entity, its political and party-related neutrality, as well as technical and managerial competence of its management staff. In short, there seems to be an important relation of cause-and-effect that would explain all these failures: the deficiency and lack of structure in the governmental environment.

Consequently, without having these reassurances of maintenance of a minimum level of expectation of control – which only one thorough high-ranked technical analysis of the grantee's conditions to carry out the work plan associated with an adequate follow-up activity and close look of the execution can provide – there would not be appropriate incentives for TSOs to follow the legislation, minimizing the occurrence of irregularities and then could execute good projects and programs.

Lastly, TCU points out the necessity that its evaluations be focused on the preventive control on the phase of analysis of propositions and celebration of tools, paying attention in an even larger scale to the misled conduct and/or functional negligence of agents and management of organs and granted TSOs, also suggesting personal responsibility and penalty applications to them – not only the grantees, as it has been commonly done – in that the irregular conduct of these latter one is eased by the former ones.

Even though the realized auditing does not have "statistic relevance" due to the small number of analyzed grants, the pinpointed cause-and-effect relations seem to really describe the reality under analysis, i.e., it would be proven that there is a faulty system for access to public funds; this system would start from the faulty choice of the entity, going over analyses and negotiations (hereby also deficient) on the grants celebration phase, and would then end up in a bad execution of activities inside the project, preventing the execution of an objective evaluation. (which can be linked with criminal resource deviation)

As shown in the Carvalho Neto's studies (2007), such problem would start in an even earlier phase, when parliamentarians from National Congress should present and negotiate additional clauses to the Budgetary plan directed to third sector organizations, thus not obeying technical criteria in accordance with the goals of the programs where they should be applied, but from clientelist criteria.

This analyses, then, turns us back to the principal/agent perspective when it shows the federal government's restrictions as to controlling its agents; it also shows how the lack of institutional incentives on this system leads to a great unevenness of information between principal and agents, which shall unfold many irregular actions outlined in the previous chapter, as well as its discovery (if so) when such analysis has already been carried out. In case it has, a preventive action can be avoided by the principal. Besides that, considering the TCU's perspectives, the leading factor to generate such asymmetry of information would be the principal, as of the limitations of its own structure when it comes to assure an efficient grants management as well as not promote an adequate degree of responsibility of its bureaucrats.

Another issue pointed out in the TCU's report that calls for attention regards its position, apparently uncomfortable, when it comes to the use of TSOs on the continuous public service delivery (as of the cases seen in the field of the health of the Indians), which seems to be named as incorrect/illegal outsourcing.

On the one hand, it is known that hiring services from TSOs can be a tool used by governments in order to run away from stricter rules when hiring public servers; on the other hand, the execution of public services does not require execution by the government on its own. At this point, we can recall Morales (1999) by whom the validity of desestatization could have been defended as it was capable of maintaining the public character of the services.

The issue regarding the incorporation of services can have a part in a debate currently on course in Brazil: many of the NGOs projects judge many actions to be continuous, i.,e., that should not be interrupted, even when these projects are finished. Therefore, it is necessary to give some thought to the way how these projects can be continued – whether by means of a better institutionalized support to the NGOs or by means of the incorporation of these activities by the state bureaucracy, in that the continuous service delivery would be the NGOs responsibility.

However, if we consider what has been proposed by Gidron et al. (1992) concerning the importance to differentiate financial issues from service delivery, we can conclude that the State should actively take up such activities as it pays for and rules them. Having this picture for analysis – regardless of monitoring and effectiveness of such actions – such service would be carried out and the State would be taking responsibility over its function as to guarantee the necessary actions over determined public policies, even when they would be complied by non-estate entities. As highlighted by Bresser Pereira and Grau (1999), the transfer on activity provision does not exempt the State from being responsible.

Thus, what seems to be troublesome is not the fact of the action's being executed by a non-estate person/organization, but the dissatisfying results obtained from a partnership establishment that has picked up in the wrong way, beginning from a deficient governmental action as to the structure of grants that has been interrupted, thus generating discontinuity of actions that could not have been stopped.

Besides all that, there still seem to be some difficulty among federal managers as to come up with public service delivery out of the state structure, which had already been raised in a very decisive way when inquiries regarding NGOs actions in the Brazilian HIV/AIDS policies were analyzed (Campos, 2005). In that work, we stated that various reasons for such difficulty would, at a first glance, be related to the poor coverage of NGOs' actions, as well as the predominance of places that entirely depended on the state network for public services under the perception that the civil society organizations' most important task should be social control and then the feeling that, once these tasks have been handed down to NGOs, the state would exempt and withdraw itself from these functions; this condition would seem to neglect the State's vision when financing and regulating public services and privilege a State-like vision when it is the one and only executor of public services.

These concerns are related to some challenges outlined by Morales (1999) when analyzing the aspects of social services delivery by TSOs. There is the challenge to keeping the State responsible for the public interest, as of the moment when it is no longer connected with social rights. We should also state that the keeping and assurance of such responsibility would not only be in the decision of who is going to provide such services, but in the proper monitoring by the State, as of the moment it decides not to carry on some activities.

Finally, the topic concerning lack of criteria as to the interpretation of the legislation comes up in the discussion on the TSOs being obliged to use law biddings the same way the government organs/agencies are used to doing. Besides not having a more detailed regulation regarding this law bidding, there are conflicts among the purchase regulations for the SO and OSCIP organizations as well as a 2005 bill of law that made necessary the occurrence of bidding throughout all the organizations that would get federal fundings.

Final Conclusions

Due to all the fact stated above, the crisis context on the State capacity regarding public services ended up strengthening relations with the third sector as well as a new perception look at its organizations and activities. By means of financing and contracting ways, the State has become, in many places, a partner, boss or purchaser of services offered by these organizations, showing that there can be a clear difference among those who finance and those who provide public services in many combinations. As for Kramer et al (1993), where there is a substantial third sector, it will be dependent on the government support in a larger or smaller scale.

The presented and analyzed data seem to clearly show that the production of public assets by TSOs ends up bringing new regulatory and institutional challenges to the State, about

which we try to brainstorm; it can be seen that they seem to be a dynamics process under development that is not exempt from contradictions and a lot of difficulties. Whether such issue has been carefully studied and analyzed in a gradual manner – thus not being a "new" issue – it does not show to be trivial, forming one of the items of the State Reform Processes, about which there are fewer conclusions drawn (Morales, 1999:56)

The proposals along with the focus of the management on the results presented in the new SO and OSCIP law bills can also be considered one step ahead as to the improvement of the legislation, once there has already been some experiments with SO in the fields of health, culture and science & technology, which have been showing good results due to their focus on the state capacity of building these policies, providing the necessary structure to award good grants and more objective monitoring and evaluation criteria. However, these are a few experiences; there are more of them taking place in the states rather than federal, once the referential materials brought up by the State reforms in the early stages of Fernando Henrique Cardoso's term ended up not being implemented in a higher scale.

According to Morales (1999), if the State withdrawal as a direct producer of assets and services shall depend mostly on the success of the initiatives of the society so as to replace it in a long-lasting and efficient way, this article also shows that these actions do also greatly depend on the initiatives of the State as to improving its capability to manage these partnerships.

The study carried out by TCU has allowed us to verify which irregularities are the most frequent ones, in order to establish a chain of causalities among the verified final results (or lack of them) along with their causes, which took place even before the awarding of TSOs.

Future researches should amplify and intensify studies like these in order to pinpoint probable differences in institutional capabilities on many public policies that depend on partnerships with the third sector and differentiate the contribution degree in the chain of causalities related to the lack of institutional capacity and corruption schemes, along with the roles of behavior of public agents.

It is important to verify whether the changes suggested by TCU will be capable of reducing the information asymmetry and whether these changes will generate transaction costs that shall be reasonable to the authors involved and can be "absorbed" inside the grants operational chain.

Lastly, the comparison between the new formats of grants brought by the new legal titles SO and OSCIP and the traditional grants in order to check whether these formats have brought improvements on the action plans, monitoring & evaluation, as well as in the transparency.

Notwithstanding, recalling the points made by Salamon and Toefler (2002), the current taxonomy of access to public funds has made way for the establishment of deficient and improper relationships between the State and the third sector, having some losses on both the good execution of public policies and the perceptions of the Brazilian society in relation

to the legitimacy of these organizations and what can contribute to the improvement of an uneven country.

After all, keeping close watch on the number of decentralized public actions by means of grants is not only related to third sector entities, but also to related states and municipalities. Despite the required improvements of the structure, it will always be a tough task to be developed by the responsible institutions and those of internal and external controls. This explains the importance of the continuous work by means of communication among the citizens and the organizations of the third sector, as it is interesting for them to "set aside all negative repercussions caused by wrongdoings of entities that name themselves NGOs which, in many cases - once they are attached to exempted interests and illicit goals, establish improper relationships with politicians and public officers so as to obtain easier ways for free budgetary transfers." (Carvalho Neto, 2007:34)

It is reasonable, then, to suppose that all accusations shown in the news reports of the country involving TSOs allow room for unaccountability as well as make resource acquisition difficult for the well established TSOs, thereby increasing competition between TSOs for new resources and eventually compromising the image of the sector as a whole

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